United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7672

United States Court of Appeals

FOR THE SECOND CIRCUIT

PANAGANGELOS ANTYPAS,

Plaintiff-Appellant,

—against—

CIA MARITIMA SAN BASILIO, S.A. and P. D. MARCHESSINI AND CO. (HELLAS) LTD. and P. D. MARCHESSINI AND CO. (NEW YORK), INC. and the SS EURYBATES, her boats, engines, tackle and apparel,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLEES' BRIEF

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STATEMENT

This is an appeal from an order of the Honorable Charles M. Metzner, United States District Court, for the Southern District of New York, filed and entered on November 14, 1975, in the office of the Clerk of the Court, wherein the action was dismissed on the grounds of forum non conveniens on the condition that defendants-appellees (1) submit to the jurisdiction of the Greek Courts and (2) waive any defense of the Statute of Limitations as to any claims against them (a46-48).*

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*References to appellant's appendix will be designated by "a", and references to appellee's appendix will be designated by "A".

FACTS

The plaintiff-appellant in this action is a Greek seaman who brings the present suit in order to recover for maintenance and cure, and injuries allegedly sustained on June 19, 1972, while employed as a seaman aboard the Greek flag vessel S.S. EURYBATES, and while said vessel was on the high seas proceeding on a voyage from Hamburg to the Far East and back to Europe (A33-38).

The action was commenced as an action at law in which jurisdiction was predicated on the Jones Act, diversity of citizenship of the parties "or in the alternative, the applicable laws of Greece." (a1)

Plaintiff is, and at all times was a Greek citizen and remains domiciled in that Republic (a1). He signed on board the S.S. EURYBATES at Rotterdam, the Netherlands, on May 27, 1971. Plaintiff signed on as an oiler pursuant to Greek articles and remained on board the vessel until repatriated from Japan (A23-24).

Defendant, CIA MARITIMA SAN BASILIO, S.A., the owner of the vessel, is a Panamanian corporation. None of its stock is owned by any citizen of the United States

(a22-23). At all times herein pertinent, it ran a liner service from Europe to the Far East (A33-38).

Defendant, P. D. MARCHESSINI & CO. (HELLAS) LTD., is a limited company organized under the laws of Greece. At all times herein pertinent, P. D. MARCHESSINI & CO. (HELLAS) LTD. acted as the EURYBATES agent whenever that vessel called at a Greek port (a24-25). It never had an office or conducted any business in the United States. It was never plaintiff's employer (a24-25).

Defendant, P. D. MARCHESSINI & CO. (NEW YORK), INC., is a New York corporation having a place of business at 26 Broadway, New York, New York. All of its stock is owned by citizens of the United States (a16-18). It acted as the vessel's limited agent in New York pursuant to an agency agreement with the owner's general agent in London (A77-79). At no time was it plaintiff's employer.

The vessel was registered under the Laws of Greece. None of its crew members were residents or citizens of the United States (A41-43).

POINT I

THE LOWER COURT WAS CORRECT IN HOLDING THAT NO BASIS EXISTED FOR THE APPLICATION OF THE JONES ACT

A. As can be seen from the facts, neither P. D. Marchessini and Co. (Hellas) Ltd. nor P. D. Marchessini and Co. (New York) Inc. employed this plaintiff or owned the S.S. EURYBATES.

With regard to the defendant, P. D. Marchessini and Co. (Hellas) Ltd., it is a limited corporation organized and existing under and by virtue of the laws of the Republic of Greece. None of its stock is owned by any citizen of the United States or the State of New York. It does not maintain an office or place of business within the United States or the State of New York. At all times herein pertinent, it acted as an agent in Greece for defendant, Cia Maritima San Basilio S.A., who owned, operated and controlled the vessel known as the S.S. EURYBATES. At no time did it, P. D. Marchessini and Co. (Hellas) Ltd., act as plainitff's employer (a24-25).

With regard to the defendant, P. D. Marchessini and Co. (New York) Inc., it is a domestic corporation organized and existing under and by virtue of the laws of the State of New York. At all times herein pertinent, it acted as a husbanding agent for defendant, Cia Maritima San Basilio S.A., when the owner's vessel came to New York. It further, from time to time, acted as an agent for defendant, P. D. Marchessini and Co. (Hellas) Ltd. with regard to matters involving that corporation. It, like P. D. Marchessini and Co. (Hellas) Ltd., at no time acted as plaintiff's employer (a16-18).

With respect to the liability of an agent for injuries sustained by a seaman aboard the principal's vessel under the Jones Act, the statute is clear that an employer-employee relationship is necessary in order to establish a claim on which relief thereunder can be granted. See 2 Norris, The Law of Seamen, § 666, 682. Furthermore, the United States Supreme Court decisions of Cosmopolitan Shipping Co. vs. McAllister, 337 U.S. 783 (1949) and Fink vs. Shepard SS Co., 337 U.S. 810 (1949), have clearly put this issue to rest. In the Cosmopolitan case, supra, the Supreme Court ruled as follows at 337 U.S. 789:

> ". . . we are unable to perceive in the statutes relating to sailors' rights or the history behind their enactment any legislative purpose to create in seamen employees of the United States through the War Shipping Administration a right to enforce tort claims under the Jones Act against others than their employers or any recognition that such right ever existed."

In the case at bar, it is undisputed that P. D. Marchessini and Co. (Hellas) Ltd. and P. D. Marchessini and Co. (New York) Inc., never employed this plaintiff or controlled this vessel's movements or operations. This Circuit, in the celebrated case of Romero vs. Garcia & Diaz, Inc., 286 F.2d, 347, 351 (2d Cir. 1961), again reaffirmed its previous holdings regarding the agent's scope of liability in a seaman's Jones Act action, in the following manner:

> "We accept fully that 'The liability of an agent for his own negligence has long been embedded in the law', Brady v. Roosevelt S.S. Co., 1943, 317 U.S. 575, 580, 63 S.Ct. 425, 428, 87 L.Ed. 471. But it by no means follows that an agent is liable whenever its principal would be G & D did not have an affirmative duty to see to it that plaintiff was provided with a safe place and with safe methods to work."

The Supreme Court, speaking through Mr. Justice Frankfurter, agreed with the decision of our Court of Appeals on that count - 358 U.S. 354, 384. To the same

effect, see the decision of Judge Cooper, in Burie vs. Overseas Navigation Corp., 205 F. Supp. 182 (S.D.N.Y. 1962), aff'd 323 Fed. 2d 873 where the following is stated at 205 F. Supp. 186:

> "'Overseas' was not a party to the Articles. The record unequivocally establishes that it had no relationship to the vessel or crew other than of an agent for the owner. Its duties, in essence, were limited to those of a ship's husband, who has been engaged to take care of specific shoreside business for the ship, but who has no authority over the management of the vessel. Under these circumstances, 'Overseas' may in no sense be deemed a party to the Articles; and consequently no relief can be granted against it. The libel as against respondent 'Overseas' is accordingly hereby dismissed. Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 69 S.Ct. 1317, 93 L.Ed. 1692 (1949); Instituto Cubano de Establizacion Del Azucar v. The Theotokos, 155 F.Supp. 945 (S.D.N.Y. 1957)."

To the same effect, see Martinez vs. Marine Transport Lines, 78 N.Y.S.2d 3, 191 Misc. 652; and Damaskinos vs. Societa Navigacion Interamericana, S.A. Pan., 255 F. Supp. 919, 922 (S.D.N.Y. 1966) where Judge McLean stated the following:

> "It is entirely clear from the uncontradicted facts set forth in the moving affidavits that the allegation of the complaint that Western 'owned' the Resolute,

> as well as the allegation that Western was the vessel's owner 'pro hac vice', are untrue. It is equally clear that the allegation that Western 'managed, operated and controlled' the vessel is untrue. It is equally plain that Western was not plaintiff's employer. The husbanding agent of a ship owned by someone else is not the employer of the seamen on the ship and is not liable to them for personal injuries under the Jones Act or the general maritime law. Cruz vs. Maritime Overseas Corp., 1963 Am. Mar. Cas. 1870 (S.D.N.Y., 1962)."

See also Dassigienis vs. Cosmos Carriers & Trading Corp., et al., 321 F. Supp. 1253 (S.D.N.Y. 1970), aff'd 422 F.2d 1016.

In view of all of the foregoing, it is respectfully submitted that the action against P. D. Marchessini and Co. (Hellas) Ltd. and P. D. Marchessini and Co. (New York) Inc. should be dismissed.

B. As can be seen from the preceding section of this Brief, there is no basis for the application of the Jones Act to the defendants, P. D. Marchessini and Co. (Hellas) Ltd. and P. D. Marchessini and Co. (New York) Inc., since these defendants neither employed the plainitff nor owned the Vessel S.S. EURYBATES. The only

question left open for discussion, therefore, is whether the Jones Act is applicable in the case at bar to the defendant, Cia Maritima San Basilio S.A., who did employ the plaintiff and who did own the Vessel known as the S.S. EURYBATES.

The quide posts in making such a determination were quite clearly provided by the United States Supreme Court in the famous landmark case of Lauritzen vs. Larsen, 345 U.S. 571 (1953). In that case the Court listed seven points of contact which should be reviewed and used as a guide.

These contacts are:

1. Place of the wrongful act.
2. Law of the flag.
3. Domicile of the injured.
4. Allegiance of the defendant shipowner.
5. Place of contract.
6. Accessibility of foreign forum.
7. Law of the forum.

Applying these points of contact to the facts of the case at bar, we find:

1. The place of the alleged wrongful act was in the open sea while the vessel was enroute to Japanese and Philippino ports (A54-64).

2. The law of the flag was that of the Republic of Greece (a12-15).

3. The plaintiff was domiciled and a national of the Republic of Greece (a1).

4. The corporate shipowner owes its allegiance to the Republic of Panama by whose laws it was organized and exists (a22).

5. The place of contract was Rotterdam, Holland, where the plaintiff was engaged (A23-24).

6. The place where plaintiff joined the vessel was in the country of Holland (A23-24).

7. Under accessibility of foreign forum, both the forum of Holland and Greece are readily accessible to the plaintiff. (It should be noted that the plaintiff signed on board pursuant to Greek Articles, and defendants-appellees have agreed to accept Greek jurisdiction pursuant to Judge Metzner's Order (a22).

8. Under the final factor, law of the forum, our courts hold that jurisdiction in an action by a foreign seaman is at best discretionary and certainly not mandatory.

As in Lauritzen, supra, there is no basis in the case at bar for the application of the Jones Act. Plaintiff was a Greek national by origin, birth and domicile; he was engaged by the vessel owners in Holland

pursuant to Greek Articles, and embarked upon the vessel in that country; any witnesses to the alleged accident would be Greek or foreign nationals and would now be in Greece or sailing with merchant vessels all over the globe; none of the witnesses who might be called would be subject to process issuing out of this court; furthermore, it is extremely doubtful that any of the witnesses would be present at the trial and even if they were, that any of them would be able to understand the proceedings; the vessel was owned, operated and managed by a foreign corporation; registered in a foreign country and flew a foreign flag. It is difficult to visualize a stronger case where the fact situation would dictate the non-application of the Jones Act and the removal of this action to a more convenient forum.

It is important to note that Mr. Justice Jackson, speaking for the Supreme Court in Lauritzen, supra, took pains to emphasize that the ability of a plaintiff to serve American process on a foreign vessel owner is not sufficient to bring a foreign transaction under American Law. The learned Justice put it as follows at page 590:

> "Under respondent's contention, all that is necessary to bring a foreign transaction between foreigners in a foreign port under American law is to be able to serve American process on the defendant. We had held it a denial of due process of law when a state of the union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state . . . . Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of controversy just because local jurisdiction of the parties is obtainable."

With regard to the applicability of the Jones Act, in suits brought by foreign seamen in American courts, the Supreme Court held as follows at page 577:

> "By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."

And again, at page 578, it states:

> "And it has long been accepted in maritime jurisprudence that '. . . if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on International law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory'. Lord Russel of Killowen in Reg. v. Jameson (Eng.) (1896) 2 QB 425, 430, 12 ERC 227."

It should be noted that in Lauritzen, supra, defendant's vessel also called at American ports quite regularly. Furthermore, the place of contracts in Lauritzen was the port of New York, while in the case at bar it was Rotterdam, Holland.

In Giatilis vs. The S/T DARNIE and United Cross Navigation Corp., 171 F. Supp. 751, 1959 A.M.C. 1248 (D. Md. 1959), a Greek seaman aboard a Liberian vessel was injured possibly within and possibly outside the three-mile limit off the Florida coast. He libelled the ship for personal injuries, failure to provide medical care,

and maintenance and cure. He later added a claim for wages due. The Court held the exact location of the accident unimportant because, all circumstances considered, American law did not apply. Thomsen, Ch. J., in delivering the opinion of the Court, stated the following at page 754:

> "Most of the witnesses on the issues of unseaworthiness, negligence, failure to supply medical attention on the ship, and libelant's present condition, are Greeks, living in Greece or employed on ships all over the world. Most of them speak Greek and not English. It is obvious that testimony, in court or by deposition of Greeks questioned by Greeks in Greek, will be better understood by a Greek judge than translations of such testimony would be understood by this court. Moreover, the important witnesses will not be subject to process issuing out of this court; many of them will be subject to process in Greece . . . . Respondent has agreed not to contest the jurisdiction of the courts of Greece over any suits that may be filed against it by libelant, and to accept service of process therein through its general agent, Carras (Hellas) Ltd., of Piraeus, Greece . . . . Translations of the medical reports from the U.S.P.H.A. hospital and doctors in Baltimore can be checked by representatives of libelant and respondents here; those records and the testimony of those doctors will not be as important as the testimony of the doctors who have been treating libelant since he returned to Greece and who are familiar with his present condition."

In Spingos vs. Transatlantic Shipping Corp. (no official citation), 1959 A.M.C. 1212 (S.D.N.Y. 1959),

Judge McGohen, in following the principles laid down in Koziol vs. Fylgia, 230 F.2d 651 (2d Cir. 1956) declined jurisdiction where a Greek crew member had commenced a libel in this district by libeling a Liberian vessel owned by a Panamanian corporation. The Court in its decision had the following to say:

> "The respondent is a Panamanian corporation. The vessel is registered in Liberia whose flag it flies. The respondent maintains an office in Greece for the purpose of receiving service of process. It may be sued there. The Maritime Law of Liberia is the same as that of the United States. It is not disputed that the libellant's claim can be adequately prosecuted and his rights adequately protected in the Courts of Greece."

In Johansson vs. O.F. Ahlmark & Co., 107 F. Supp. 70 (S.D.N.Y. 1952), a foreign seaman signed articles in a foreign port for services on a foreign ship owned by a foreign corporation. The Court in declining to apply the Jones Act, stated the following:

> "The Jones Act is inapplicable to a suit by a foreign seaman who signs articles in a foreign port for service on a foreign ship even if he is injured aboard ship in an American port. The papers submitted fail to show where the instant voyage terminated, but no authority can be found to indicate that if the voyage

> did end in the United States, that factor alone would justify an exception to the rule. Accordingly, the exception to the first cause of action under the Jones Act is sustained."

The question of applicability of the Jones Act to an alien seaman was also thoroughly discussed in the leading case of O'Neill vs. Cunard White Star, 160 F.2d 446 (2d Cir. 1947) by Judge Learned Hand. In that case, plaintiff was an alien seaman domiciled in the United States for 20 years, had applied for citizenship and reared a family in the United States. He had signed on, aboard a British flag vessel, in London, for a voyage to Canada and return. The Court, in holding the Jones Act inapplicable, held as follows at page 448:

> "It is true that a state may impose duties upon its own nationals while they are abroad; but the plaintiff must prove that Congress meant to impose duties upon the nationals of other states while they were beyond the territorial limits of the United States, a proposition vastly different in its consequences. Perhaps Congress might go even so far as that, granted an occasion pressing enough: but surely there should be the clearest warrant of its purpose to do so, for it is as extreme an exercise of power as one can well imagine; a bit of absolution beyond all ordinary conventions.
>
> There is nothing in the books leading us to suppose that the Act should be so construed; rather the contrary."

The applicability of the Jones Act was recently examined in this District by Judge Dawson in the case of Moutzouris vs. National Shipping & Trading Corp., 196 F. Supp. 482, 483 (S.D.N.Y. 1961):

> "The Jones Act is inapplicable. See Lauritzen v. Larsen, 1953, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254; Romero v. International Terminal Operating Co., 1959, 358 U.S. 354, 383-385 79 S.Ct. 468, 3 L.Ed. 2d 368. This is the type of case where the District Court could, in its discretion, decline jurisdiction. Conte v. Flota Mercante Del Estado, 2 Cir., 1960, 277 F.2d 664-668. See Canada Malting Co. v. Person Steamships Ltd. 1932, 285 U.S. 413, 421-423, 52 S.Ct. 413 76 L.Ed. 837, Cf., Cerro De Pasco Copper Corp. v. Knut Knutson, O.A.S., 2 Cir., 1951, 187 F.2d 990; United States Merchants' & Shippers Ins. Co. v. A/S Den Norske Afrika Og Australie Line, 2 Cir. 1933, 65 F.2d 392. Where the plaintiff and whatever witnesses he might call are Greek, speak only Greek, live in Greece and very likely are employed on Greek Ships, and where the action is governed by Greek law, full and complete justice can best be obtained in the Greek courts. Giatilis v. The Darnie, D.C.D. Md. 1959, 171 F. Supp. 751, 754. See Koziol v. The Fylgia, 2 Cir. 1956, 230 F.2d 651."

See also Lunde vs. Skibs A.B. Herstein, 103 F. Supp. 446 (S.D.N.Y. 1952); Jonassen vs. United States, 103 F. Supp. 862 (E.D.N.Y. 1952); Burford vs. Sun Oil Company, 319 U.S. 315 (1943) and the concurring opinion of Mr.

Justice Douglas; Yohanes vs. Ayers S.S. Co., 451 F.2d 349 (5th Cir. 1971); Sonneson vs. Panama Transport Company, 298 N.Y. 262 (1948) and The Madgapur, 3 F. Supp. 971 (S.D.N.Y. 1933). We might also interject at this point that Romero vs. International Terminal Operating Co., 358 U.S. 354 (1959) is a further reaffirmation by the Supreme Court of the principles previously laid down in Lauritzen, supra. Mr. Justice Frankfurter, speaking for a majority of the Court, referred to Lauritzen as follows at page 383:

> "We need not repeat the exposition of the problem which we gave in Lauritzen v. Larsen. Due regard for the relevant factors we there enumerated, and the weight we indicated be given to each, preclude application of American law to the claims here asserted."

It is also significant that, in his dissenting opinion, Mr. Justice Black termed the decision of the majority in Romero, supra, as a "further . . . reduction in the scope of the Jones Act."

Although it is clear beyond the realm of any doubt that the District Court is empowered to decide the cases where the Jones Act would apply, in doing so the Court must be guided by the spirit, intent and policy enunciated

by the Supreme Court in Lauritzen. We must not lose sight of the fact that Mr. Justice Jackson took pains to emphasize "the necessity for mutual forebearance if retaliations are to be avoided"; and followed with the admonition that, ". . . any contact which we held sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its laws to an American transaction." (page 582, supra). (Emphasis added)

Consequently, it is submitted that the Court, in considering this appeal, should take into account the general philosophy of the Supreme Court in the Lauritzen case, which clearly imports a policy of reaction from the previous extensions of the Jones Act. The Court therein stressed the international character of maritime law and favored a doctrine of comity, with self-restraint in applying American law to foreign transactions. It is apparent that the Court adopted a principle of statutory construction consistent with that of our Circuit in The Paula, 91 F.2d 1001 (2d Cir. 1937) and the personal beliefs of Judge Learned Hand as expressed in Taylor vs. Atlantic Maritime Co., 179 F.2d 597 (2d Cir. 1950).

In the case of Hellenic Lines, Ltd. vs. Zacharias Rhoditis, 398 U.S. 306, 26 L. Ed.2d 252, 90 S.Ct. 1731 (1970), the Court was concerned with whether or not the Jones Act applies to allow recovery to a Greek seaman who was injured in a United States port on a Greek flag vessel which had a base of operation out of New York. The ship involved in that case had been engaged in regularly scheduled runs in and out of the United States. Its entire income was from cargo either originating or terminating in the United States. The vessel owner had its largest office in New York and another in New Orleans. More than ninety-five percent of its stock was owned by a United States domiciliary, who although a Greek citizen, had lived in this country since 1945, and had managed the vessel out of New York.

None of these facts, it is submitted, are present in this case. The Rhoditis case, supra, therefore, is entirely distinguishable on its face.

A recent case distinguishing Rhoditis with facts similar to the one at bar, is Bernd Schneider vs. Deutsche Dampfschifffahrtsgesellschaft "Hansa," and Curtis Bay Towing Company of Virginia, 1970 A.M.C. 1510 (E.D. Va.

(1970). In that case, the Court applied the Lauritzen rule and found that Rhoditis was not applicable in view of the facts involved therein. See also, Stamatakos vs. Hunter Shipping Co. S.A., 1972 A.M.C. 1001 (E.D. Pa. 1972); Yohanes vs. Ayers Steamship Co., Inc., 451 F.2d 349 (5th Cir. 1971), cert den. 406 U.S. 919 (1972); Ngo To Po vs. Cambridge Nav. Co., 1972 A.M.C. 1810 (E.D. La. 1971); Dassigienis vs. Cosmos Carriers & Trading Co., 422 F.2d 1016 (2d Cir. 1971); Garis vs. Compania Maritima San Basilio, 1971 A.M.C. 2655 (N.Y. Sup. Ct. 1971); Camarias vs. M/V LADY ERA, 318 F.Supp. 379 (E.D. Va. 1969), aff'd 432 F.2d 1234 (4th Cir. 1970); Schneider vs. Hansa, 1970 A.M.C. 1510 (E.D. Va. 1970); Frangiskatos vs. Konkar Maritime Enterprises, 1973 A.M.C. 333 (S.D.N.Y. 1972), aff'd 471 F.2d 714 (2d Cir. 1972); Rodriguez vs. Shiffahrts-Gesellschaft Reith, 348 F. Supp. 777 (S.D.N.Y. 1972); Rivadeneira vs. Skibs A/S Snefonn, Skips A/S Bergehus, 353 F. Supp. 1382 (S.D.N.Y. 1973); Liossatos vs. Clio Shipping Co., 350 F. Supp. 1053 (D. Md. 1972); Leonard Admr. vs. General Carriers, 1975 A.M.C. 471 (U.S.D.C. N.D. Cal.).

Plaintiff has also relied upon the decision of this Court in Bartholomew vs. Universe Tank Ships, Inc., 263 F.2d 437 (2d Cir. 1959), wherein this Court applied

the precepts set forth by the Supreme Court in Lauritzen, supra, and found that the Jones Act was to be applied. However, in Bartholomew, supra, substantial contacts upon which the Court premised its decision included United States ownership of the vessel; American officers of the defendant owning corporation; principal place of business in New York; the plaintiff lived and worked in the United States for a substantial period of time and the contract of employment was executed in the United States. Again, it is submitted that none of these factors appear in the instant action.

In Pavlou vs. Ocean Traders Marine Corp., 211 F. Supp. 320 (S.D.N.Y. 1962) the Court not only considered the factor that the owners principal place of business was New York, the Court also took careful cognizance of the fact that the vessel was generally engaged in chartering for the United States trade and that almost one-half of the stock of the owning corporation was owned by United States citizens. Once more, none of these facts exist in the instant case. These cases and all other cases cited by appellant in support of its argument are similarly inapplicable.

As can be seen from the foregoing, the Jones Act has never been applied to a situation such as the one

t bar, where the contacts with the United States are minimal, slight and unsubstantial. To do so would be inconsistent with those notions of due process that determine the presence of legislative jurisdiction. It would also result in placing the American courts in an unenviable and burdensome position of imposing American morality and juridical postulates upon the world, in complete contravention of international conflicts of law principles.

In view of the above, it is submitted that the lower court was correct in holding that no basis existed in the application of the Jones Act in the subject case.

POINT II

THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING ON THE CONDITION THAT DEFENDANTS SUBMIT TO THE JURISDICTION OF THE GREEK COURTS AND WAIVE ANY DEFENSE OF STATUTE OF LIMITATION

Where, as in the case at bar, there are no substantial contacts between the United States and the seaman's injury, and where the law of the United States is not applicable, justice can just as well be done by remitting the plaintiff to a more appropriate forum. Romero vs. International Terminal Operating Co., 358 U.S. 354 , 381-384, 79 S.Ct. 468, 3 L.Ed. 2d 368; Lauritzen vs. Larsen, supra; Volkenburg P.P.A. vs. Nedereland-Amerik. Stoomv. Maats., 336 F.2d 480 (1st Cir. 1964); Zouras vs. Menelaus Shipping Co. Ltd., 336 F.2d 209 (1st Cir. 1964); Filippou vs. Italia Societa Per Azioni di Navizione, 254 F. Supp. 162 (D. Mass. 1966); Giatilis vs. The Darnie, 171 F. Supp. 751 (D. Md. 1959); Stamatakos vs. Hunter Shipping Co. S.A., 1972 A.M.C. 1001 (E.D. Pa. 1972); Yohanes vs. Ayers Steamship Co., Inc., 451 F.2d 349 (5th Cir. 1971), cert den. 406 U.S. 919 (1972); Ngo To Po vs. Cambridge Nav. Co., 1972 A.M.C. 1810 (E.D. La. 1971); Dassigienis vs. Cosmos Carriers & Trading Co., 422 F.2d

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The plaintiff-appellant herein is an alien. He was engaged pursuant to Greek Articles by a foreign corporation who has an agent within the Republic of Greece who is authorized to receive service of process. Any witnesses to the alleged accident would be Greek or foreign nationals and would now be in Greece or sailing with merchant vessels all over the globe. None of the witnesses who might be called would be subject to process issuing out of this court. Furthermore, it is extremely doubtful that any of the witnesses would be present at

trial or that any of them would be able to understand the proceedings. The overwhelming majority of plaintiff's medical records are located in Greece and, of course, are much more easily available to the courts in that forum. There is no reason why the plaintiff-appellant's claim here cannot be adequately prosecuted and his rights adequately protected in the Courts of Greece.

Significantly, the defendants herein have agreed to submit to the jurisdiction of the Greek Courts and have agreed to waive any defense as to the Statute of Limitations with respect to this claim.

In the case of Brillis vs. Chandris (U.S.A.) Inc., 215 F. Supp. 520, 523 (S.D.N.Y. 1963), Judge Dawson made the following pertinent remarks:

> "[1] Viewing all the contacts of this maritime tort, both with the United States and foreign states, and giving each its appropriate weight and significance, it is clear that such contacts as there are with the United States are at best minimal and thus insufficient for the application of the Jones Act. Moutzouris v. National Shipping & Trading Co., 196 F. Supp. 482 (S.D.N.Y., 1961), aff'd on reargument, 194 F.Supp. 468 (1961); Romero vs. International Terminal Operating Co., 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed. 2d 368 (1959); O'Neill v. Cunard White Star, 160 F.2d 446 (2d Cir., 1947).

"[2,3] The second defense raised by defendants seeks to invoke the doctrine of forum non conveniens and is addressed to the discretion of the Court. It is unnecessary to set forth anew the factual grounds upon which the Jones Act was found to be inapplicable. All are relevant in determining whether to retain jurisdiction over this controversy. In addition, several other matters may here be given weight which are inappropriate in the context of the Jones Act. Voyaitis v. National Shipping & Trading Corp., 199 F. Supp. 920 (S.D.N.Y., 1961).

"These additional considerations consist of the following: Plaintiff is Greek and does not speak English. All witnesses to the accident are likewise Greek, residing in that country and speaking only Greek. Medical records existing in the United States can easily be brought before a Greek tribunal. The only medical treatment with which plaintiff is dissatisfied occurred in Greece.

"In a situation factually similar to the instant one, the Court of Appeals of this circuit said:

> 'It is prima facie undesirable that that an overburdened District Court should conduct a trial in a personal injury action between foreigners, with all evidence on the issue of liability and much of the evidence on damages given in a foreign tongue by witnesses equally or more available in the foreign forum, and with reliance having to be placed on expert testimony as to the governing law, when, as here, an adequate remedy is available in the country

> where both parties reside and to which the plaintiff will return.' Conte v. Flota Mercante Del Estado, 277 F.2d 664, 667 (2d Cir., 1960)."

And in the case of Hatzoglou vs. Asturias Shipping Co., S.A., 193 F. Supp. 195, 196 (S.D.N.Y., 1961), Judge Bryan in granting defendant's motion to dismiss, had the following to say:

> "Neither the accident nor the alleged failure to treat properly, occurred in the United States or on American waters, or between American ports, or on an American vessel, or on a vessel with which witnesses who could testify to the facts concerning the accident or the alleged failure to treat aboard the vessel are Greek nationals. None of them appear to reside here. From all that appears, their testimony would have to be given in the Greek language and would have to be translated. It is true that the testimony as to treatment in California and the visit to the doctor in New York would be relevant. But in all probability such testimony would be based almost entirely on medical records which would readily be made available in another forum and such oral testimony as might be required could be readily taken by deposition. Testimony as to libelant's condition at the time of the trial could easily be obtained in Greece where plaintiff resides."

In Giatilis vs. The Darnie, supra, the Court had the following to say on the subject: (p. 754)

> "Most of the witnesses on the issues of unseaworthiness, negligence, failure to supply medical attention on the ship, and libelant's present condition, are Greeks, living in Greece or employed on ships all over the world. Most of them speak Greek and not English. It is obvious that testimony, in court or by deposition of Greeks questioned by Greeks in Greek, will be better understood by a Greek judge than translations of such testimony would be understood by this court. Moreover, the important witnesses issuing out of this court; many of them will be subject to process in Greece . . . Respondent has agreed not to contest the jurisdiction of the courts of Greece over any suits that may be filed against it by libelant, and to accept service of process therein through its general agent, Carras (Hellas) Ltd., of Piraeus, Greece . . . Translations of the medical reports from the U.S.P.H.S. hospital and doctors in Baltimore can be checked by representatives of libelant and respondents here; those records and the testimony of those doctors will not be as important as the testimony of the doctors who have been treating libelant since he returned to Greece and who are familiar with his present condition."

As can be seen from the above, the District Courts have consistently refused to take jurisdiction over cases where, taking everything into account, there are not enough relevant contacts with the United States to justify its retention and where the controversy is between aliens and could more conveniently be tried elsewhere. See Garis vs. Compania Maritima San Basilio, S.A., 386 F.2d 155

(S.D.N.Y. 1966).

This Court's most recent pronouncement on the subject of the discretion of the Court in cases where the doctrine of forum non conveniens is applied is in the case of Fitzgerald vs. Texaco, Inc., Nos. 74-1958 and 74-1468, 2d Cir., June 25, 1975. The Court stated at page 4379 as follows:

> "Although plaintiffs should rarely be deprived of the advantages of their forums, 'the doctrine leaves much to the discretion of the court,' whose decisions, absent a clear showing of abuse of discretion, may not be disturbed." (Emphasis added)

In the same vein, the Court states that:

> "A district court has discretion to dismiss an action under the doctrine of forum non conveniens, however, even though the law applicable in the alternative forum may be less favorable to the plaintiff's chance of recovery. Canada Malting Co., Ltd. v. Paterson Steamships, 285 U.S. 413, 418-20 (1932). A contrary holding would emasculate the doctrine, for a plaintiff rarely chooses to bring an action in a forum, especially a foreign one, where he is less likely to recover. But the issue remains one of balancing the relevant factors, including the choice of law." page 4384

It is respectfully submitted that the lower court did not abuse its discretion in dismissing the complaint herein

on the condition that defendants-appellees submit to the jurisdiction of the Greek Courts and waive the Statute of Limitations as to this claim.

Plaintiff-appellant in Point III to its Brief has erroneously concluded that the lower court granted summary judgment in this action. The lower court dismissed the action on the basis that Greece was the most convenient forum inasmuch as plaintiff is Greek, his vessel was registered in Greece, all potential witnesses are in Greece, his employees base of operations is Greece, most medical records are in Greece and the plaintiff has a remedy in Greece. Thus, this issue is completely inapplicable.

POINT III

THE LOWER COURT WAS CORRECT IN FINDING THAT PLAINTIFF FAILED TO DISTINGUISH THE FACTS IN THIS CASE FROM THOSE IN GARIS

Judge McLean, in a strikingly parallel opinion to the facts in the instant action, in Garis vs. Compania Maritima San Basilio, S.A., 261 F. Supp. 917 (S.D.N.Y. 1966), dismissed a complaint for personal injuries by a Greek seaman sustained aboard a vessel owned by defendant Compania Maritima San Basilio, S.A., the very same defendant that appears as appellee herein, on the grounds that the defendant has insufficient contacts with the United States to justify retaining jurisdiction.

In Garis, supra, a Greek seaman sued for damages for personal injuries sustained on September 15, 1965 while the vessel, a Greek flag vessel owned by defendant, Compania Maritima San Basilio, S.A., was on the high seas, enroute to Australia.

The proof submitted to the Court in Garis, supra, indicated that the Greek seaman was also a citizen and resident of Greece, and had signed a "work contract"

to serve aboard the vessel which specified that all claims or disputes resulting from injury or sickness would be under the exclusive jurisdiction of the Greek Courts. The plaintiff joined the vessel at Rotterdam on May 27, 1965 and signed ship's articles which specified that the terms of the Greek Collective Bargaining Agreement were to apply to the plaintiff's employment and that claims arising out of accidents were to be judged exclusively by Greek Courts. Further, the injured seaman was hopitalized in California and subsequently was repatriated to Greece for further treatment.

The Court found that Compania Maritima San Basilio, S.A. was a Panamanian corporation with its principal office in Greece and with all officers, directors and shareholders being citizens and residents of Greece. In addition, the Court found that the vessel's crew was hired in Greece and that the crew list indicated most of its members were Greeks.

Most importantly, the Court found that the defendant called its vessels the Marchessini Line, and that P. D. Marchessini & Co., Limited, whose office is in London,

had a contract with defendant designating it as the defendant's exclusive agent as far as management and operation of the vessel was concerned and that it would have the power to appoint sub-agents in various countries. Pursuant to this authority, P. D. Marchessini & Co. Limited, by contract dated June 30, 1960, appointed P. D. Marchessini & Co. (New York), Inc. agents for defendant's vessels in the United States. The Court acknowledged that P. D. Marchessini & Co. (New York), Inc. is a New York corporation whose stock is owned by the two sons of P. D. Marchessini.

In 1966, the Court found that P. D. Marchessini does not reside in the United States, though he visits the country occasionally and that his son, Alexander Marchessini, President of the New York corporation, was born in Greece but is now a naturalized American residing in New York.

The Court related that Alexander Marchessini testified that P. D. Marchessini & Co. (New York), Inc. acts as agents for defendant's vessels in New York and occasionally through sub-agents, in other American ports. Its duties included arranging for pilots, tugs and

stevedores, as well as booking cargo and placing advertisements for the vessels in New York newspapers. These duties were performed pursuant to the instructions of P. D. Marchessini & Co. Limited.

The Court found that neither P. D. Marchessini & Co. (New York), Inc. nor Alexander Marchessini nor his brother owned stock or were officers or directors of either Compania Maritima San Basilio, S.A. or P. D. Marchessini & Co. Limited. The Court further found that despite the fact that defendant Compania Maritima San Basilio, S.A. borrowed money from Chase Manhattan Bank secured by a First Fleet Mortgage on all its vessels, the defendant, in answers to interrogatories, stated that there was no American financial interest in the vessel nor that any United States interest in any way contributed money to the building, maintenance or development of the vessel.

The Court in weighing the law to be applied stated:

> "It seems clear that Greek law would apply, not only because the parties agreed that it would, but also because a weighing of the factors listed in Lauritzen v. Larsen, 345 U.S. 571 . . . (1953) leads to the same conclusion. Moreover, most, if not all, of the witnesses to the accident would be Greeks, presumably speaking English imperfectly, if at all. None of the witnesses reside in New York. If respondent's witnesses are still in its employ, it would seem that it could produce them at a trial in Greece as readily as in New York. If they are not, presumably such witnesses, being Greek citizens, would be more easily available in Greece than in New York. Libelant is in Greece. Libelant's present doctors are in Greece." 261 F. Supp. at 919

The Court applied the principle stated in Conte vs. Flota Mercante Del Estado, 277 F.2d 664 (2d Cir. 1960) that an action between foreigners where much of the evidence is in a foreign tongue and witnesses are equally or more available in a foreign forum and an adequate remedy is available in the country where both parties reside and to which the plaintiff will return would be "prima facia undesirable" for the district court to retain jurisdiction.

Significantly, the Court found in Garis, supra, that the evidence failed to support any allegations that

Compania Maritima San Basilio, S.A. was owned and controlled by American citizens. The Court concluded at Page 919 of the opinion in the following manner:

> "Taking everything into account, there are not enough relevant 'contacts' with the United States to justify retaining jurisdiction of this controversy between aliens which could more conveniently be tried in Greece. . . . Respondent has indicated its willingness to appear in any action to be brought by libelant in Greece. . . . Respondent also states that it is willing to post a bond 'to assure its appearance' in a Greek action."

It should be noted that defendants herein have assented to submit to the jurisdiction of the Greek Courts and are willing to post a bond, if the Court so orders, to assure its appearance. The affidavit of Constantine Spaminondas Roussos, a Greek attorney, indicates taht there is an adequate remedy available to plaintiff in that forum (a19-21).

The Second Circuit Court of Appeals, in a per curiam opinion reported at 386 F.2d 155 (2d Cir. 1967), affirmed the factual determinations made by Judge McLean at the district court level.

It is manifest that the facts of the Garis case, supra, are directly in consonance with the action presently before the Court. Specifically, the plaintiff herein sustained injuries on board a foreign flag vessel on the high seas in the Pacific (A54-64). The interrogatories reflect that the plaintiff signed an employment contract on May 27, 1971 at Rotterdam, which contained terms which gave exclusive jurisdiction to the Greek Courts in the event any claim for injury or sickness was made by the seaman (A23-24). Further, the plaintiff would necessarily have to sign ship's articles when joining the vessel at Rotterdam which would also have contained terms giving exclusive jurisdiction of any claims to Greek Courts.

In contrast to the Garis case, supra, medical treatment was rendered initially at Kobe, Japan, with subsequent repatriation for further treatment in Greece (A49-53, 65-67).

As in Garis, supra, we are dealing with the

same defendant with principal offices in Greece, wherein all of its officers, directors and shareholders are citizens and residents of Greece (a22-23). Further, as in Garis, supra, the entire crew aboard defendant's vessel was hired in Greece and comprised almost entirely a Greek crew (A41-43).

Also, as in Garis, supra, defendant's vessel in this action was served by a general agent located in London pursuant to a contract with defendant Compania Maritima San Basilio S.A. which gave to said London agent, P. D. Marchessini & Co. Ltd., exclusive management and operation of its vessels as well as the right to appoint various agents throughout the world (A74-76). Exactly as in Garis, supra, P. D. Marchessini & Co. Ltd. appointed P. D. Marchessini & Co. (New York), Inc. agent for defendant owner's vessels in the United States.

As the record reflects, P. D. Marchessini is not a United States citizen (a22), though Alexander Marchessini, President of the New York corporation, is a naturalized American citizen and does reside in New York (a16). Further, the affidavits contained in the record also reflect, as in Garis, supra, that

neither P. D. Marchessini & Co. (New York), Inc. nor any of its stockholders owned stock in, or were officers or directors of either P. D. Marchessini & Co. Ltd. or Compania Maritima San Basilio S.A. (a15-18).

In 1966, the Court found that the financial transactions between defendant vessel owner and the Chase Manhattan Bank did not reflect any indication of American ownership. Appellant's Exhibit 13, whose date is apparently July 28, 1960, apparently made no impression upon the Court in the Garis case, supra. Further, much of the documentation submitted as evidence by the plaintiff was in existence prior to determination in Garis, supra, and yet the Court felt that such evidence was insufficient to warrant the retention of jurisdiction. In particular, the fact that Marchessini Lines was subject to the Shipping Act of 1916 would have been within the cognizance of the Court, since its joint service agreement was first approved by the Federal Maritime Commission on February 1, 1960. It is obvious that the statement of accounts attached as appellants Exhibit 8, pertaining to the vessel EURYTAN, the specific vessel on board which Mr. Garis was injured, was before the Court in the Garis case, supra, since it

reflects expenditures concluding with December 31, 1965. Mr. Garis was injured in September 1965. It is obvious that the Court would not consider such an account to indicate substantial contact with the United States. Again, even more recent agency agreements than those annexed as appellants Exhibit 11 were before the Court in Garis, supra.

At every turn, we see the parallel set of facts between the instant action and the Garis decision, supra. There appears to be no discrepancy at all in the facts of either case. As in Garis, supra, the plaintiff is attempting to create substantial contacts which would cause the Court to retain jurisdiction. As we have demonstrated, these substantial contacts do not exist. The plaintiff is making a bald attempt to foist an action between aliens upon the Court and appellant is attempting to argue the same facts again. The conclusion reached by the Court in Garis, supra, and in this case should be the same: there are not sufficient substantial contacts between the defendant and the United States to warrant the Court to retain jurisdiction.

None of the recent cases that plaintiff has relied

demonstrate a shift in the law on facts similar to Garis, supra, as opposed to the law applied at the time of the Garis case. As heretofore demonstrated, the law applied in Garis, supra, continues to have efficacy. Garis, supra, has never been reversed. Moreover, the cases relied upon by plaintiff are clearly distinguishable, and, significantly, in subsequent cases, this and other courts have upheld the law applied in Garis. See also, Philippine Packing Corp. vs. Maritime Co. of Philippines, 519 F.2d 811 (9th Cir. 1975); Olympic Corporation vs. Societe Generale, 462 F.2d 376 (2d Cir. 1972); Grammenos vs. Lemos, 457 F.2d 1067 (2d Cir. 1972); Domingo vs. States Marine Lines, 340 F. Supp. 811 (1972); Odita vs. Elder Dempster Lines, Ltd., 286 F. Supp. 547 (S.D.N.Y. 1968); Garis vs. Compania Maritima San Basilio, 1971 A.M.C 2655 (N.Y. Sup. Ct. 1971).*

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*It should be noted that counsel for plaintiff-appellant herein represented Mr. Garis in an action in the New York Supreme Court based upon the same facts argued previously before this Court, and this case was dismissed on the grounds of forum non conveniens.

POINT IV

THE SHIPPING ACT OF 1916 IS REGULATORY IN NATURE AND DOES NOT CONFER JURISDICTION UPON UNITED STATES COURTS FOR SUITS BY ALIEN SEAMEN AGAINST FOREIGN SHIP OWNERS FOR ALLEGED INJURIES SUFFERED ON THE HIGH SEAS

The appellant, in his brief, attempts to argue that the Shipping Act of 1916 confers jurisdiction upon United States Courts for actions such as this brought by an alien seaman against a foreign ship owner for injuries allegedly suffered outside of United States waters. Such a contention, it is submitted is completely ridiculous and absurd.

Title 46 §817, in pertinent part states the following:

> "Every common carrier by water in foreign commerce and every conference of such carrier shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established."

As can be seen from the above, the basis for the enactment of the Shipping Act of 1916, 46 U.S.C.A. 801, et seq. is regulatory. (See also, Rate Regulation In Ocean Shipping, 78 Harvard L. Rev. 635 (1965)). This Act, as amended, was designed to prevent discriminatory abuses in shipping rates and to prevent unjust prejudices to United States exporters. See, Rate Regulation in Ocean Shipping, supra. The Act was in no way designed to be used as a springboard for conferring jurisdiction with regard to suits by alien seamen against their foreign employers for alleged injuries which have no contacts with the United States. Thus, it is obvious that the fact that the defendant, Cia Maritima San Basilio, S.A. filed a tariff with the Federal Maritime Commission back in 1960 does not confer United States jurisdiction or make United States laws applicable to the matter at bar.

To accept the argument promulgated by the plaintiff that the mere filing of such a tariff by a foreign carrier subjects said carrier to the general jurisdiction of United States Courts, would create a jurisdictional exception which would deluge the courts with litigation involving foreign carriers having no

substantial contacts with the United States.

The absurdity of plaintiffs position can best be realized by following it to its logical conclusion. If all it takes to subject a foreign carrier to United States Courts and law for all purposes is the mere voluntary compliance with any United States regulatory statute or law involving carriage of goods by water, then every time a foreign vessel passes through United States waters or was involved with United States Customs, the United States Coast Guard or health authorities it would be deemed to be subject to United States jurisdiction and law for all purposes and for all manner of suits.

It is axiomatic in the law that statutes must be construed strictly, especially those that are regulatory in nature. Furthermore, it should be noted that acceptance of plaintiffs hypothesis would completely defeat the purposes of the Shipping Act of 1916. For if United States Courts utilized this statute to exert general jurisdiction, it would further deter foreign carriers from ever filing information with regard to their rates with the Federal Maritime Commission - a problem which the Federal Maritime Commission has already found to be

an impediment to the legislative intent of the Shipping Act of 1916, see Mitsui S.S. Co. Ltd. - Alleged Rebates to A. Graf & Co., 7 F.M.C. 248 (1962).

In view of the above, it is respectfully submitted that the Shipping Act of 1916 is regulatory in nature and does not confer jurisdiction upon United States Courts for suits by alien seamen against foreign ship owners for alleged injuries suffered on the high seas. It is further respectfully submitted that plaintiff is merely grasping at straws and has no valid basis for the retention of this suit in this already overburdened Court.

CONCLUSION

The lower court was correct in dismissing this action on the grounds that defendants (1) submit to the jurisdiction of the Greek Courts and (2) waive any defense of our Statute of Limitations as to any claims against them.

WHEREFORE, defendants-appellees respectfully requests that this Court affirm the Order and Judgment below together with costs and disbursements.

Respectfully submitted,

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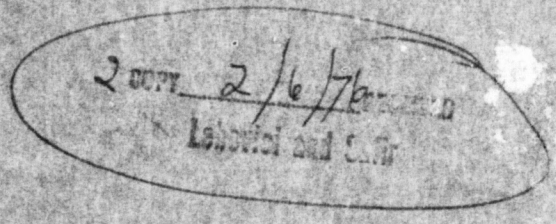

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